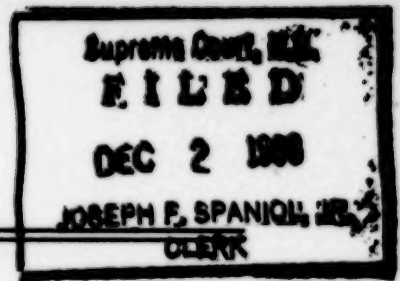


A
No. 88-305



In The
Supreme Court of the United States
October Term, 1988

— o —
STATE OF SOUTH CAROLINA,

Petitioner,

vs.

DEMETRIUS GATHERS,

Respondent.

— o —
**ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF SOUTH CAROLINA**

— o —
JOINT APPENDIX

— o —
T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA*
Chief Deputy
Attorney General

Post Office Box 11549
Columbia, SC 29211
803-734-3737

WILLIAM ISAAC DIGGS*
Chief Attorney

JOSEPH L. SAVITZ, III
Assistant Appellate
Defender

S.C. Office of
Appellate Defense
Suite 301
1122 Lady Street
Columbia, SC 29201
803-734-1330

(Counsel for Petitioner)

(Counsel for Respondent)

* Counsel of Record

=====
**Petition for Certiorari Filed August 5, 1988
Certiorari Granted October 11, 1988**
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RELEVANT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|--------------------|--|
| September 17, 1986 | Demetrius Gathers arrested and charged with murder and criminal sexual conduct concerning the death of Richard Haynes on September 13, 1986. |
| January 12, 1987 | Gathers indicted for the offenses of murder and criminal sexual conduct by the Court of General Sessions. |
| January 14, 1987 | State notifies the defendant and counsel of its intention to seek the death penalty. |
| March 2, 1987 | Gathers re-indicted by the Court of General Sessions for the crimes of murder and criminal sexual conduct. |
| March 16, 1987 | Gathers' trial commences before the Honorable Richard E. Fields, Presiding Judge in the Court of General Sessions for Charleston County, South Carolina. |
| March 20, 1987 | Gathers is convicted of murder and criminal conduct in the first degree. |
| March 21, 1987 | Sentencing proceedings held and jury recommends the death penalty and trial court sentences Gathers to the death penalty for murder and thirty (30) years consecutive for criminal sexual conduct in the first degree. |
| March 30, 1987 | Notice of Intent to Appeal to the South Carolina Supreme Court filed. |
| June 6, 1988 | Opinion <i>State v. Demetrius Gathers</i> filed by the South Carolina Supreme Court. |

August 5, 1988 Petition for Certiorari filed by the
 State of South Carolina.
 October 11, 1988 Petition for Certiorari granted by
 this Court. -

CHARLESTON COUNTY
 COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

DEMETRIUS GATHERS

EXCERPTS FROM TRIAL

EXCERPTS OF GUILT PHASE TESTIMONY OF
 DOROTHY LOUISE HAYNES

(p. 560) DOROTHY LOUISE HAYNES, being first
 duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Condon:

. . .

(p. 561) Q. And what number child was Ricky
 Haynes?

A. Fourth.

Q. He was your fourth child?

A. (Nodding affirmatively)

Q. And he went to high school at Middleton, I be-
 lieve?

A. Wallace and Middleton.

Q. Middleton. And where did he live in September
 of last year?

A. He lived in the north area on John Street.

Q. How long had he lived there?

A. Almost approximately three months.

Q. Three months?

A. Uh-huh.

Q. And as I understand it he had some odd jobs in September?

A. Yes.

Q. Didn't have regular employment?

A. No.

Q. And he had some mental problems, didn't he?

A. Yes.

(p. 562) Q. And he had been in and out of our mental hospital a few times?

A. Three times.

Q. Three times. When his troubles began—when did his mental troubles begin?

A. Approximately about two years.

Q. About two years ago?

A. Yes, uh huh.

Q. But you never had any problems with him in terms of violence, did you?

A. No.

Q. And he—directing your attention to September of last year, on that Saturday night.

A. Yes.

Q. You saw him that Saturday, didn't you?

A. Yes.

Q. What time did he come to your home?

A. He came to my house about twenty minutes to nine.

Q. Twenty minutes to nine?

A. Uh huh.

Q. And did he have anything with him when he came to visit you?

A. Yes, he had a bag, and he set it down in the . . .

Q. Now you called him Ricky, didn't you?

A. Ricky, yes.

(p. 563) Q. And he was a religious person, wasn't he?

A. Yes, he was.

Q. Tell us about that.

A. He got saved about three years ago, before he got really in this mental problem. And after that he got sort of mentally disturbed—I am sorry, before that—and he came to the Lord, and he loved the Lord.

Q. Did he often carry his religious items—

A. He carry his religious item, his Bible; and he talks to people all the time about the Lord.

Q. He was sort of a preacher, wasn't he?

A. Yes, he was.

Q. And did he give himself a title?

A. Yes.

Q. Called himself Reverend Minister?

A. Right.

Q. But he had no formal religious training, did he?

A. No, not really.

Q. Did he have a church?

A. Yes, he was at my church and also at Bethel Pentecostal Holiness.

Q. Was he married or unmarried?

A. Unmarried.

Q. Did you have any knowledge of him being a homosexual in any way?

(p. 564) A. No, he was not.

Q. And on that night you said he got to your home about twenty minutes to nine?

A. Yes.

Q. How close is your home to the bike pathway?

A. I will say about probably five hundred yards.

Q. Very close?

A. Yes.

Q. Five hundred yards?

A. Yes.

Q. And did he have occasion on that night to leave?

A. Yes.

Q. About what time did he leave?

A. He leave my house about—it was about 10:15.

Q. At night?

A. Yes, uh huh.

Q. And did he say where he was going?

A. No. I tried to get him to stay, and he said he was going. And—

Q. Did you have the impression he was coming back or going away?

A. Yes. He told me, said he was going but he wasn't going home, so I thought well he would just go, like he liked to wander around, and come back. That is what he usually does.

(p. 565) Q. Did he take his belongings with him?

A. Yes.

Q. Did he have occasion to refer to money in any way?

A. Well, yes, but he didn't have any that night.

Q. Did you lend him some money?

A. Yes, I give him five dollars.

Q. Was that five single dollar bills or one—

A. No, it was one five dollars bill.

Q. And, of course, he didn't come back that night?

A. No, he didn't.

Q. And what time were you notified?

A. This was about three o'clock in the morning.

Q. Three o'clock? That would be Sunday morning?

A. Yes.

Q. I want to show you a few items here. Your Honor, I believe these would be basically without objection at this point.

Mr. Kent: That is true, Your Honor.

By Mr. Condon:

Q. State's Exhibit Number 7?

A. Yes.

Q. Is that—

A. All both.

Q. And State's Exhibit Number 10?

A. Yes.

(p. 566) Q. These are Ricky's Bibles?

A. Yes.

Mr. Condon: Your Honor, I want to move these into evidence at this time.

The Court: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 7 and 10 were received into evidence.)

By Mr. Condon:

Q. And, Mrs. Haynes, State's Exhibit Number 8, do you recognize that?

A. Yes. That is olive oil, what he used to anoint people and pray for them.

Q. Used to anoint people and pray for them?

A. Yes.

Q. That is what Reverend Minister Haynes had?

A. Yes.

Q. He carried that with him?

A. Yes.

Q. And State's Exhibit Number 9, which appears to be a sheet? Do you recognize that, Mrs. Haynes?

A. That is his.

Q. That is Ricky's sheet?

A. Yes.

Q. And he carried this with him on that night?
(p. 567)

A. Well I didn't know what he had in the bag, but I know that is his things.

Q. I understand. So you didn't know what he had in the bag when he was leaving—

A. Right, I didn't know—

Q. —but that was a sheet he would normally have?

A. Yes. Yes.

Mr. Condon: Your Honor, I would like to move both of these into evidence.

The Court: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 8 and 9 were received into evidence.)

By Mr. Condon:

Q. Now, Mrs. Haynes, do you know the defendant, Demetrius Gathers?

A. No, I don't.

Q. And your son was thirty-one years of age—

A. Yes.

Q. —when he was killed?

A. Yes.

• • •

(p. 568) By Mr. Kent:

• • •

Q. Oh. What was he wearing when you last saw him, Mrs. Haynes.

A. Light-colored shirt and black pants.

Q. Were they regular trousers?

A. Yes, uh huh.

Q. Do you know if he had any other clothing with him?

A. No. I didn't look in his bag. Except I know those is his things that is up here.

• • •

EXCERPTS OF THE TESTIMONY OF ESDAVAN DUVAL HARDRICK

• • •

(p. 573) Q. So it was you, Demetrius, Zandell and Ron?

A. Ron had left and went home.

Q. What time did he go home?

A. Well I will say it was about five then.

Q. What were y'all doing, just bumming around, or what?

A. Yes.

Q. Were you drinking?

A. No.

Q. And Ron went home about five?

A. Yes.

Q. Tell us about this bike path. Have you been on that bike path before?

A. Yes, sir.

Q. What is it like?

A. Well it's just a long bike path running from Wap-poo Road all the way down to Highway 61. You know, people just walk up down there, walk up or jog or ride their bike.

Q. How far away is that bike path from your home?

A. Not very far. I live almost by Forest Park, and the bike path is right next to Forest Park.

(p. 574) Q. All right. Five or six o'clock what were you doing?

A. By six o'clock, me and Demetrius and Zandell been together, and we walked over to the park, Forest Park.

Q. Where is Forest Park?

A. That is located on Playground Road right next to the bike path.

Q. Right next to the bike path?

A. Uh huh.

Q. What did y'all do there?

A. Well, we sat out on the park for a little while with this other guy, and then from there we walked back down to the bike path.

Q. What time was that?

A. I don't know. It was about 6:30 at this time, I guess.

Q. What were you doing, walking?

A. Yes.

Q. Then what did you do?

A. Well after we got to the bike path we met up with Dyonzoria.

Q. Dyonzoria?

A. Yeah.

Q. Did you also call him Dee Brown or Dondrell Brown?

A. Dee Brown.

Q. And what time did you meet up with him?

(p. 575) A. It would have to be about 6:30 or 7:00 then.

Q. Was it dark at this time?

A. No, it wasn't dark.

Q. What did y'all do?

A. Well we walked around for quite some time.

Q. Anybody have a radio?

A. Yeah, I had a radio.

Q. What kind of radio was it?

A. It was kind of a small radio, not very large.

. . .

Q. Anybody have an umbrella?

A. Yes. Dyonzoria was walking with his umbrella.

. . .

Q. Steven, I want to hand you what is marked State's Exhibit 6 for identification purposes at this point. Do you recognize this umbrella?

A. Yes, sir.

Q. What umbrella is this?

A. This was the umbrella that Dyonzoria was walking with.

. . .

Mr. Condon: Your Honor, I want to move this (p. 576) into evidence at this time.

The Court: Without objection?

Mr. Kent: No objection.

The Court: Admitted, appropriately marked, State's Exhibit.

(Thereupon, the umbrella previously marked as State's Exhibit 6 was received in evidence.)

By Mr. Condon:

Q. Okay. Was this seven o'clock?

A. About seven o'clock.

Q. And where did y'all go?

A. Well from there we walked around in Ardmore. We walked over to Sequoia Apartments.

• • •

Q. What did y'all do there?

A. We talked to some guys there.

Q. How long did that last?

A. About five or ten minutes at the most.

Q. And who was with you?

A. It was me, Dyonzoria, Zandell Hayes and Demetrius.

• • •

(p. 577) Q. What happened?

A. From there we walked around. Then we went back over to the Majik Market out there by the 20th Century Fox. We was out there for about ten minutes.

Q. You went to the Majik Market by 20th Century Fox?

A. Yes.

Q. What is the 20th Century Fox?

A. That is a club.

Q. Where is that located?

A. On Highway 61.

Q. And the Majik Market is next to it?

A. Yes, sir.

Q. How far away is that spot from the bike path?

A. That is a good deal away from there. I can't say how far, though.

Q. Went by foot?

A. Yes.

Q. What did you do there at the Majik Market and 20th Century Fox?

A. Well we sat out there for a little while, you know. And then from there we went back to the bike path. When we left the bike path we went over to the Beer Barn, which is now called—

Q. Went where now? To the Beer Barn?

A. Yes.

(p. 578) Q. Where is that located?

A. That's located on Highway 17.

Q. Highway 17? So you went from Highway 61 to Highway 17, the four of you?

A. Yes, sir.

Q. How long did that take you to get there?

A. About twenty minutes or thirty minutes.

Q. You went to the Beer Barn?

A. Yes.

Q. Did you buy beer there?

A. Yes, sir.

• • •

Q. How much did you buy?

A. A twelve-pack.

Q. What happened after that?

A. Well from there we went back down to the bike path, where we had met up with Mr. Haynes.

Q. All right. What time, about, did you leave the Beer Barn?

A. At this time it would have been about eight or nine.

. . .

(p. 579) Q. Were you drinking beer along the way?

A. Yes.

Q. Who bought the beer?

A. We got someone to buy the beer for us, but Dyonzoria went with him.

Q. Who paid for it?

A. Me and Zandell had some money. We kind of like pitched in together.

Q. How many beers did you drink before you got back to the bike path?

A. About one.

. . .

Q. And you say you got up with Ricky Haynes, is that your testimony?

A. Yes.

Q. Do you know Ricky Haynes?

A. No, I do not.

. . .

Q. And where was he when you first saw him?

A. He was standing by the bench on the bike path.

. . .

(p. 580) Q. What was he doing?

. . .

Q. What was the lighting like? Was it dark or light?

A. It was dark out there.

Q. Dark out there? And when you got near Ricky Haynes, what was he doing?

A. It looked like he was changing clothing to me.

Q. You say it looked like he was changing clothing. Can you explain that, please?

A. Well because it looked like he was pulling up his pants at the time.

Q. Did he pull up his pants?

A. Yes.

Q. After he pulled up his pants what did Ricky Haynes do?

(p. 581) A. He sat back on the bench.

Q. How big was he?

A. Not very big.

. . .

Q. When he sat back on the bench what did y'all do?

A. When he came up to him, all of us told him hi, hello. Then we sat down next to him. And we started drinking our beer. We had the radio on at the time. And then Demetrius was talking to the guy, and he said that he didn't want to talk to him at the time.

Q. Who said that?

A. Mr. Haynes.

Q. What was Demetrius saying to him?

A. I don't know. I did not overhear it.

Q. What happened?

A. Well after that I believe Demetrius struck the man with his fist.

Q. You say you believe he did?

A. Well he did.

Q. What did you see?

A. I saw him hit the man with his fist.

Q. Where were you at this time?

A. I was sitting on the other end of the bench.

Q. How long was the bench?

(p. 582) A. Not very long. I guess a little longer than this right here. (Indicating)

Q. About four feet?

A. Yes.

Q. Where was Zandell Hayes?

A. He was standing more or less like on the side of the man.

Q. Where was Dyonzoria Brown?

A. He was sitting like next to me.

Q. Right next to you?

A. Yes.

Q. So two of you are on the bench next to Ricky Haynes?

A. (Nodding affirmatively)

Q. Zandell was behind him?

A. Yes.

Q. And your testimony is Demetrius Gathers struck him in the face with a fist?

A. Yes, sir.

Q. Where did he hit him in his face?

A. I guess about in his mouth.

Q. Excuse me?

A. In his mouth.

Q. What happened?

A. Well he fell back. When he fell back, he fell more (p. 583) or less into Zandell Hayes. And at that time he went wild.

Q. Who went wild?

A. Mr. Haynes.

Q. What happened?

A. After that, Zandell Hayes had hit the man.

Q. How did Zandell Hayes hit the man?

A. Hit him with his fist.

Q. Where?

A. I believe in his face.

Q. What happened next?

A. Then he kind of like moved up the bike path, and him and Demetrius was fighting.

Q. Who moved up the bike path?

A. Mr. Haynes.

Q. How did he move?

A. They were more or less tussling up the bike path.

Q. Who was tussling?

A. Mr. Haynes and Demetrius.

Q. How far away did they go up the bike path?

A. Not very far up the bike path. Let me see. I can't recall how far it was.

Q. Over ten yards?

A. It could have been about ten yards, yes.

Q. This would have been Demetrius Gathers and Ricky (p. 584) Haynes tussling?

A. Yes, sir.

Q. Explain that. How were they tussling?

A. Well they were fighting, and Mr. Haynes was backing up, and then they kind of like hooked up together, and they were like rolling on the ground.

Q. What was Zandell Hayes doing?

A. He was over there with me at the time.

Q. What was Dyonzoria Brown doing?

A. He was over there with me at the time.

Q. What happened next?

A. After he had pinned the guy, Mr. Haynes, on the ground, that is when Dyonzoria went over there. And I believe he hit the guy. He hit the guy a couple of times.

Q. How did he hit him?

A. He hit him with his foot and with his fist.

Q. Where did he kick him?

A. In his ribs.

Q. Where did he hit him with his fist?

A. Probably about the same place.

Q. In his ribs?

A. (Nodding affirmatively)

Q. How many blows at that time?

A. I don't know. I couldn't say.

(p. 585) Q. What happened next?

A. Well then after that Dyonzoria had got a bottle, and he struck the guy in the head with the bottle, twice.

Q. How far away were you at this time?

A. I was still by the bench, about—

Q. You can estimate about ten yards?

A. Ten yards.

Q. What happened next?

A. Then Demetrius had picked up a bottle, and he hit the guy with the bottle until it finally broke, which was about three times.

Q. Same bottle or a different bottle?

A. Same bottle.

Q. Was Ricky Hayes saying anything?

A. I believe he was saying, "Oh, Lord".

Q. You say you believe he was saying "Oh, Lord". What was he saying?

A. That is what it sounded like to me, "Oh, Lord".

Q. How many times did he say that?

A. About twice.

Q. After the bottle was broken over his head what happened?

A. Well I believe he was unconscious down there because he wasn't moving, and that is when I went over to him and kind of like nudged him with my foot to see if he was all (p. 586) right. At this time me and Mr. Hayes told them let's go. So we walked back into the middle of the path going to Starcastle Apartments, and that is when Dyonzoria had joined up with us. As we were walking

through there we could look back and see the bike path and see that Demetrius and the guy—well Demetrius was still hitting the guy—

. . .

Q. What about the Starcastle Apartments, where were they?

A. That is right—like on the side of the bike path. There is some woods between the bike path and the Starcastle Apartments.

Q. You say that Zandell Hayes and Dyonzoria Brown were with you?

A. We were in the middle of the path.

Q. Going to Starcastle?

A. Yes, on our way to Starcastle.

Q. And your testimony is you looked back?

A. Uh huh.

(p. 587) Q. And you saw what?

A. He was still hitting the guy.

Q. Who was?

A. Demetrius.

Q. How was he hitting him?

A. He was hitting him with the umbrella at this time.

Q. Hitting him with the umbrella?

A. Uh huh.

Q. How did he get that umbrella?

A. Well when Dyonzoria had went to the store he left the umbrella with him.

Q. Left it with who?

A. Demetrius.

Q. At the store?

A. Yes.

Q. Which store?

A. The Beer Barn.

Q. So at that point in time Demetrius got the umbrella?

A. Yes.

Q. And you say he was hitting Ricky Haynes with the umbrella?

A. Yes, sir.

Q. What was Ricky Haynes doing when this happened?

A. He wasn't doing nothing. I believe he was unconscious at the time.

(p. 588) Q. Did he have his clothing on?

A. Yes.

Q. Where was he hitting him with the umbrella?

A. Well he was more or less on his stomach, on his face, at the time; and I believe he was hitting him with the handle part—well he was hitting him with the handle part—and about in his back and his head. Upper part of his back.

Q. So you say he was hitting him with the handle part, meaning he was using this end?

A. Yes.

Q. How far away were you when you saw this?

A. By this time about twenty yards, in the middle of bike path.

Q. What happened next?

A. Well the guy's pants was like not all the way up. It was like, you know, about to his thighs. And then that is when he had got the umbrella and stuck that up the man's behind.

Q. Who did that?

A. Demetrius.

Q. What end did he use?

A. Used the top end of the umbrella.

Q. You mean the white end?

A. Uh huh.

(p. 589) Q. And did you see Demetrius Gathers pull down or touch the clothing of Ricky Haynes?

A. I can't recall that.

Q. How long, if you can say, did he use this umbrella?

A. About three minutes, I guess. Three minutes at the most, three to five.

• • •

Q. Did you hear any noise from Ricky Haynes?

A. I believe he was groaning at the time.

Q. Was it a loud groan or a low groan?

A. A low.

Q. How far away was Ricky Haynes at this point from the park bench?

A. About ten or fifteen yards.

• • •

Q. What did Demetrius Gathers do after he used this umbrella?

A. After that, you know, we called him and tell him let's go. Then we were walking to the Starcastle Apartments, and after we had got out the path that is (p. 590) when he ran and rejoined up with us.

Q. He rejoined up with y'all, is that what you are saying?

A. Yes.

Q. Who was with you at this time?

A. It was Dyonzoria, Demetrius, Zandell and myself.

Q. And you went to the Starcastle Apartments?

A. Yes, we did.

• • •

(p. 591) Q. When you first came upon Ricky Haynes did he have any items out?

A. Yes he had a Bible. And some paper.

Q. What was he doing with that?

A. It was just sitting on the bench.

(p. 592) Q. A Bible?

A. Uh huh.

Q. Did you have occasion to go through any of his belongings?

A. Yes, I did.

Q. What did you do?

A. I looked through the bag, through his bags.

Q. Looking for something to steal?

A. Yes.

Q. Did Demetrius Gathers go through his belongings?

A. Yes, he did.

Q. What did he do?

A. Well when he went through his belongings he started throwing things about, just throwing them everywhere, looking through things.

Q. When did he go through his belongings?

A. Right after I did.

Q. Where was Ricky Haynes when this happened?

A. He was still on the ground.

Q. Anybody touching him?

A. No, not at that time.

Q. And at what point did Demetrius go through his belongings?

A. Well it was like, after I had gone over there and nudged the guy to see if he was all right, at that point.

(p. 593) Q. So before the umbrella?

A. Yes.

Q. How long did it take Demetrius to go through his belongings?

A. Not very long. About a minute at the most.

Q. Then he went back to him with the umbrella?

A. Yes, he did.

Q. And hit him over the head?

A. Yes, sir.

. . .

(p. 596) Q. So you are saying all four of you were going back to the bike path? Is that right?

A. Yes.

Q. Why were you going back to the bike path?

A. Well he went back—we was going back to the bike path—we were going back there—I can't really say.

Q. Where did you go?

A. Well after we turned around, me and Dyonzoria, we went back to Rosemary's house.

Q. You and Dyonzoria went back to Rosemary's house?

A. (Nodding affirmatively)

Q. Did you enter that path to go to the bike path?

A. No, we didn't enter it.

Q. You got near it?

A. Yes.

Q. You went back to Rose's house?

A. Yes.

Q. Who had the knife at this time?

A. Dyonz—Demetrius.

Q. And who went with him back to the bike path?

A. Well, right before we had ran back I believe that Mr. Hayes had already went back there.

Q. Mr. Hayes, who is that?

A. Zandell.

Q. Zandell Hayes. You call him Zan, don't you?

(p. 597) A. Yes.

Q. He is your good friend, isn't he?

A. Yes, he is a good friend.

Q. All right, what happened?

A. After that, me and Dyonzoria were still up there at Rose's house. Then Mr. Hayes came back there with us.

Q. You don't call him Mr. Hayes, do you?

A. Well, Zan.

Q. You call him Zan. What happened?

A. After that, that is when Dyonz—Demetrius had came back to the house.

Q. Zandell was on that bike path with him, too, wasn't he?

A. Yes, he was on there.

Q. Both of them went out there?

A. Well Zandell had went a little before him.

Q. Zandell went before him?

A. Yes.

Q. Out to the bike path? And you say Demetrius had the knife?

A. Yes.

Q. How long were they out there on that bike path?

A. Well from the time that we—me, Dyonzoria and Demetrius went out there, Zandell was out there probably about a minute by himself; and when me and Dyonzoria (p. 598) turned around, he came back in about two minutes. And Demetrius was still out there.

Q. When did Demetrius rejoin you?

A. About three to five minutes after we had went back to Rose's house.

Q. You weren't on that bike path a second time, were you?

A. No, I wasn't.

Q. What did Demetrius tell you about what happened on the bike path when he went out there the second time?

A. Well when he had came back he said that he had stabbed the guy.

Q. He told you that?

A. Yes.

. . .

(p. 600) Q. Now back at the Starcastle, about what time are we talking about when Demetrius went back with Zandell on the bike path? About what time?

A. About 9:30 or 10:00.

Q. Could it be later?

A. I don't think it was later.

Q. And you say that Demetrius was on that bike path a little bit longer than Zandell?

A. Zandell was out there a little bit longer than he was.

CROSS-EXAMINATION BY MR. KENT

. . .

(p. 623) Q. Thank you. I believe you stated in one of these statements that you guys generally hang out at this bench?

A. Yes, we do.

Q. Do a lot of drinking there?

A. Yes.

Q. Do a lot of marijuana there?

A. Yes, we do.

. . .

(p. 629) Q. And you come up to this bench, and there is Mr. Haynes?

A. Yes.

Q. And he apparently is changing clothes?

A. Yes.

Q. His trousers are not all the way up?

A. No they weren't. He was on the verge of pulling them up.

• • •

(p. 631) Q. What were you all doing while you are drinking all this beer there at the bench?

A. Listening to the radio.

Q. Did you talk to Mr. Haynes?

A. We told him hello.

Q. Anybody else talk to Mr. Haynes other than that?

A. Well Demetrius was talking to him, and he said that he didn't feel like talking to him.

• • •

(p. 633) Q. Are you sure—as you sat there listening to the radio with Mr. Brown between you and Richard Haynes, are you sure who punched Mr. Haynes first?

A. Yes, I was.

Q. And you were talking to Zan Hayes at the time this happened?

A. I was talking to Dee Brown at the time.

Q. Mr. Haynes goes to the ground with the first punch?

A. When Demetrius had hit him, he fell back into Zandell.

• • •

(p. 634) Q. But Dee Brown gets up?

A. Yes, he did.

Q. And he joins into the tussle?

A. Not right then. After Demetrius had already pinned the guy on the ground.

Q. Now did Demetrius pin Richard Haynes on the ground right there by the bench?

A. No, he didn't.

Q. It was on up the path some?

A. Yes, it was.

Q. I believe you have testified about ten yards?

A. Yes.

• • •

Q. About that distance? Once Demetrius is fighting with Richard Haynes on the ground, that is when Dee Brown gets into it?

A. Yes, he does.

(p. 635) Q. And then he comes over and hits this man with the bottle?

A. He kicked him a couple of times first.

Q. He kicked him first?

A. Uh huh.

Q. Where did he kick him?

A. Along the ribs.

Q. Did the man resist after that? Or do you remember?

A. He was on the ground. He was pinned. He couldn't do anything.

Q. You were also separated from him by thirty or so feet, ten yards?

A. (Nodding affirmatively)

Q. And three men. Isn't that right?

A. Yes.

Q. And Zan, Demetrius and Dee Brown are all around this fellow when this is going on, isn't that correct?

A. Yes, it was.

Q. And you remained on the bench, is that right?

A. Yes, it is.

Q. This didn't bother you, either?

A. It had bothered me, but I couldn't do much about it.

Q. But you stayed right there, is that right?

A. I moved after Dyonzoria had hit the guy in the head with the bottle a couple times, and Demetrius, to check (p. 636) and see if he was all right.

Q. Was that before or after you went into his belongings.

A. That was right before.

Q. Right before. So you also assured yourself that he was disabled before you went into his bag of belongings, isn't that right?

A. He was unconscious, yes, he was.

Q. You knew that. Is that right?

A. No, I didn't at the time. He was groaning.

Q. This man had two bags of belongings, do you remember?

A. Yes, he did.

Q. Okay. Did you go into either of them while these three fellows are beating on Mr. Haynes?

A. I looked in the bag.

Q. Didn't you see anything you liked?

A. No, I didn't.

Q. Now they stop beating him at some point, correct?

A. Yes, they do.

Q. And it's at that point that you say Demetrius Gathers jabbed this man in the behind with the umbrella?

A. Well at the point that he did that I was in the path.

Q. You were in the path?

(p. 637) A. (Nodding affirmatively)

Q. You had already started to go along with—who, Dee Brown?

A. And Zandell.

Q. And you were a ways into the path?

A. We were like in the middle of the path.

Q. In the middle? Where was this man's body located at that point?

A. About ten yards.

Q. Up away from the bench?

A. Yes.

Q. Did you testify, sir, that Demetrius Gathers probed this man with the tip of his umbrella in his behind for two or three minutes?

A. Well he didn't do that for two or three minutes, but he was beating the man with the umbrella for about that long.

. . .

(p. 649) Q. Zandell definitely did have the knife on the way to McNeal's right after he had come from the bike path and had been there alone for some time, isn't that correct?

A. Well from the bike path, when Demetrius came back, he had the knife; and he told us that he had stabbed the man. He showed the knife to us.

Q. Mr. Hayes?

A. No, Demetrius.

Q. You did not see the knife?

A. He shown it to us when he said that.

. . .

CLOSING ARGUMENT OF SOLICITOR CHARLES M. CONDON

. . .

(p. 1201) Mr. Condon: On behalf of the Haynes Family, on behalf of the people who have been here, I'm sure on behalf of the defendant himself, we thank you for your close attention.

At this stage of the proceeding your duty at (p. 1202) this point becomes to decide the appropriate punishment for the murder of Richard Allen Haynes. And His Honor will instruct you on the applicable law in South Carolina, and I want to briefly go through that with you, if I might.

You are to weigh, in coming to your decision, the mitigating circumstances—that is the circumstances that lessen the severity of this murder—as well as the aggravating circumstances—that is those circumstances that make it worse. Before a death sentence can be imposed in this state the jury must find beyond a reasonable doubt the existence of an aggravating circumstance. In this case we rely on the aggravating circumstance of criminal sexual conduct in the first degree. You have found him guilty of that beyond a reasonable doubt, and that has in effect been decided although you have to make a further finding at this point, and we rely on that circumstance.

Once that circumstance is found the mitigating circumstances have to be considered. If you do find mitigating circumstances—and that is circumstances that will lessen the severity of this murder—the death penalty can still be imposed.

Let's go through the mitigating circumstances (p. 1203) that the defendant relies upon in this case. His Honor will instruct you that one of the mitigating circumstances or a circumstance that they think lessens the severity of this murder is the age or mentality of the defendant. Well the proof has been very clear. He is nineteen years of age. He has family that loves him. No evidence of any mental disease or defect. Knows what is going on. Able to go through school.

Now there has been some talk here of: This is a young man feeling his oats. Or boys, I think that was the term. Well you tell Richard Allen Haynes about these boys out there on that bike path. He knows what he is doing.

They also talk about the lack of the capacity of the defendant to conform his conduct to the requirements of law. He has full capacity to do that. He chooses not to. Look at his record.

They also say the defendant was under the influence of mental or emotional disturbance. The only disturbance that this defendant had on that night was that he was disturbed that he got blood on his shirt and he had to change that before he went to the nightclub.

And they talk about another mitigating or a (p. 1204) circumstance that lessens the severity of this murder is the fact that he doesn't have any prior convictions involving the significant use of violence against other people. Well you can look at his record. He has been through the system. Let's look at the totality of the circumstances in this case. You will have these exhibits. Look at them again.

Oh, and how not to decide this case. His Honor is going to charge you, and of course it only makes common

sense, in terms of being comfortable with your verdict and proud of it, I would be the first to say that this is not an easy procedure whatsoever. No one takes any comfort or any pleasure whatsoever in sentencing anyone to die.

It's your responsibility in this case to make this decision. It's not a easy one. But you have all stated under oath in the pretrial part of this trial that if the facts and the circumstances warranted it and the law allowed it you could vote for and sign your name to a document calling for the death penalty. This is the case. It's not even close.

And look at the evidence. This defendant, Demetrius Gathers—and if you were to decide this (p. 1205) case based on sympathy—and, of course, that is not the way to do it—but looking at Reverend Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way. You look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime. Let's look at that.

First of all, this is State's Exhibit Number 38, the home of Demetrius Gathers. Middle class home. He has got a roof over his head. Schooling provided to him. Teachers, very impressive teacher. Family members that care for him. No talk here of being forced into stealing for the sake of getting money for food.

Look at that night. This defendant had money. Go looking to buy marijuana. They go and in fact buy alcohol. He has got a home. What does he choose to do? Goes to a nightclub. Has money for a nightclub. Those characteristics. It doesn't stop there, doesn't stop there by any

means. You can talk in terms of his prior record. You are aware of those. Family Court. Court of General Sessions. And now he is before you for a most heinous act.

And look in terms of what happened out there on (p. 1206) that bike path. Reverend Minister Richard Allen Haynes was at his parents' home. Dorothy Haynes, Jesse Haynes. And he decides to go for a walk. This defendant, drinking his beer, comes upon him, with others. Reverend Minister Richard Allen Haynes has his Bible out, sitting on a park bench in our county, in our community, at a place where he had every right to be, and he chooses not to talk to this defendant.

What ensued is hard to believe and to describe, but you have heard the testimony. An attack begins that happens in this country, in this community, and while Reverend Minister Haynes begs for mercy—Lord no, Lord no—the degradation continues. The circumstances of aggravation in this case are overwhelming.

Under your responsibility, under our law, and weighing the mitigating and aggravating circumstances, the verdict in this case, the decision, must be death.

And you will have this instrument of torture and pain. And when the defendant talks about him being a young man and feeling his oats, not knowing any better, you tell Ricky Allen Haynes, when this instrument was in his private body part, that this (p. 1207) defendant was a young man who didn't know what he was doing.

And as his life fluids seeped out onto our public park, and as he was losing consciousness and with the pain shooting throughout his body, you tell Reverend Minister

Richard Allen Haynes that this defendant was feeling his oats, was acting wild and crazy, and this was a high school prank. And it doesn't stop there.

After using that instrument he goes and socializes and goes back. The depravity, the premeditation, the willfulness, the wantonness. An animal would have gotten more mercy. He goes back and with a knife stabs Reverend Minister Haynes in his abdomen. And with little thought, with no thought, as to Reverend Haynes' rights, as to Reverend Haynes' family, goes back and goes to the 20th Century Fox nightclub. Goes to sleep that night. I am sure he slept very peacefully because there was no concern to him of this atrocity.

And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend (p. 1208) Minister Haynes was a religious person. He had his religious items out there. This defendant strewn them across the bike path, thinking nothing of that.

Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks (p. 1209) and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune.

And he took things as they came (p. 1210) along. He was prepared to deal with tragedies that he came across in his life.

And there has been some talk about this being a tragedy. Well let's get one thing straight. This isn't a tragedy. Tragedy is a birth defect, something over which we have no control. This is an atrocity. This was a willful, premeditated act of this defendant, who is Charleston County, on our shores, in this country, took with the most eager pleasure the life of another in the most gruesome, hard to describe and hard to believe circumstances. The appropriate punishment in this case is death.

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personel effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit (p. 1211) on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally.

Reverend Haynes believed that he could come onto our public parks and sit and be protected, that the law protected him. That Demetrius Gathers would not reign su-

preme on that public bench. And he doesn't reign supreme. The law in this case protects Reverend Minister Haynes. The proper verdict, the only verdict in this case is death. Thank you.

* * *

PENALTY PHASE ARGUMENT OF DEFENSE COUNSEL WESCOT SANDLIN

(p. 1211) Mr. Sandlin: Ladies and gentlemen of the jury, you have already found Demetrius Gathers guilty in this case. And you are respected for that. It's important that we function as a government of laws. And that justice be done. The question before us is the same question that has been with us since the beginning of this trial, and that is: Where is the justice in a painful situation? There is no way any of us can deny that point. It's a point of agreement that I think is irrefutable.

You have already demonstrated your high regard for human life in returning the verdict that you (p. 1212) have returned. I ask you to continue that high regard, in considering the penalty in this case. We can't restore life. The law allows an option for taking a human life as a punishment. And that kind of contradiction places us constantly in a situation where we must deal with the law and its origins and its impact on society for the good of all people.

The proceedings that we are engaged in that take so much time are proceedings that seem to dwell often in the past. We must dissect what has happened. We must analyze. We must deal with the facts and the law to determine just what happened in the past. There is a reason

why we do this. That reason is so that all of us can live happily in society in a future.

I wish there were some way that Ricky Haynes could speak to us, but that is not possible. Ricky Haynes is a victim, and a victim I don't want you to forget when you go into that jury room to make the determination of sentence. Ricky Haynes has been constantly characterized as Reverend Minister Haynes. The clear implication is that he was a Christian.

I ask you to think about what the implications of that Christian faith were and are and will be in (p. 1213) the future. I ask you to think about what the State has presented and what we have presented in a situation that is filled with seeming contradictions and inconsistencies. Many unanswered questions. Questions that none of us in this room will ever be able to answer, including the defendant himself.

An example of that would be the nightclub and the return to the scene. There is no way that the defendant could have known all of what happened on the bike path. In his statement he has admitted involvement in the event. He has admitted his role. Acting with others in a crime of violence.

In his criminal record you find only one other crime of violence as a juvenile, an incident which he did not provoke, an incident in which he responded. Perhaps in a way very similar to the defendant in this case—I mean to the victim in this case.

All of us are searching for the truth, all of us are looking for justice. Part of the search for justice re-

quires compassion and mercy. In doing that, of course, any of the questions that we have to deal with that we have unanswered for us, not knowing the precise role, the exact role that Demetrius Gathers had in this death, the death of (p. 1214) Ricky Haynes, whatever doubts we have must be resolved in favor of life in prison. Life in prison certainly is punishment. It is certainly not letting someone off.

The real question, ladies and gentlemen, is where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?

When you go into that room to make your decision, there won't be anyone who will second-guess your decision in there and the way you go about making it. You are answerable only to God, the God of us all. Blessed are the merciful.

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PENALTY PHASE INSTRUCTIONS

(p. 1216) The Court: Madame Forelady, ladies and gentlemen of the jury, the defendant, Mr. Demetrius Gathers, has withdrawn his request to make a statement to the jury. I previously indicated that he would. That request has been withdrawn.

Now, Madame Forelady, ladies and gentlemen, it now becomes your duty to decide what sentence you will recommend that this Court impose upon the defendant, Demetrius Gathers. There are three possible verdicts you are to consider in this case. One is the death penalty, which in this state is by electrocution. And the second is life imprisonment with a finding of the existence of a stat-

utory aggravating circumstance. And the third is life imprisonment without a finding of the existent statutory aggravating circumstance.

Now the order in which I explain these three sentences is in no way a recommendation by this Court as to which sentence you should choose to recommend. It is simply that one must be stated.

By this recommendation of sentence form which I (p. 1217) hold in my hand, you the jury may recommend that this Court sentence the defendant to death. Please observe that immediately below the body of this recommendation there are twelve lines. That is where, should you decide to recommend the death penalty, each one of the deliberating jurors will sign his or her name.

It is the law in this state, Madame Forelady, ladies and gentlemen of the jury, that a recommendation for the imposition of the death penalty be a unanimous recommendation, and that each and every deliberating juror sign his or her name to the recommendation form.

I will now read to you the text of this form. It states: "We, the jury, in the above-entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravated circumstance . . ."—at this point there is a place provided for you to write such circumstance, about which I will instruct you further— "... now recommend to the Court that the defendant, Demetrius Gathers, be sentenced to death."

Now for this recommendation to be made—that is, that the defendant be sentenced to death—you must first find that a statutory aggravating (p. 1218) circumstance

existed beyond a reasonable doubt. What is a statutory aggravated circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly of this state has declared by statute would make worse—that is, aggravate—the offense of murder when the two occur together. In other words, it is something which increases the enormity or adds to the injurious consequences of the offense.

Upon this sheet of paper which I hold in my hand are written the words “statutory instructions.” You will have this sheet of paper with you in your jury room during your deliberations. The body of this form states, and I quote: “In determining whether to recommend that the defendant, Demetrius Gathers, be sentenced by the Court to life imprisonment or death, you may consider the following statutory aggravating circumstances, to wit: That the murder was committed while in the commission of rape, criminal sexual conduct in the first degree.”

The old statutory statute described as rape has been amended in this state to refer to the offense involving a sexual battery as criminal sexual conduct in the first degree, which I previously (p. 1219) explained to you in the guilt phase of this trial.

Now, Madame Forelady, let me emphasize to you that this is the only circumstance you may consider as an aggravating circumstance. Should you find, and it must be a unanimous finding—that is, a finding by each and every one of the deliberating jurors—should you find that the State has proven beyond every reasonable doubt the existence of the aggravating circumstances listed on this sheet of paper, then you would be authorized, which is to say

permitted, to consider recommending to this Court that the defendant be sentenced to death.

What do I mean by the term proven beyond a reasonable doubt? What I do not mean is a weak doubt, or a fanciful doubt. But rather it is a doubt which the name itself suggests, a doubt for which you can give a reason.

And please pay particular attention to this. You are never required to recommend the death penalty. Even if you find that a statutory aggravating circumstances existed at the time the offense occurred.

I instruct you further that should you find the State has not proven that such a circumstance existed, that is to say you find that you still have (p. 1220) some reasonable doubt as to the existence of such a circumstance, then you would not be authorized to recommend the death penalty. And your recommendation must be life imprisonment.

Now should you find beyond a reasonable doubt that the aggravated circumstance listed on this sheet of paper existed at the time of the murder, and should you then decide after weighing such finding against the elements in favor of a recommendation of life imprisonment, about which I will instruct you later, that the recommendation of the jury is to be that the defendant be sentenced to death, then it would be your duty, Madame Forelady, to write on the recommendation of sentence form the statutory aggravating circumstance which you have found.

That is to be written in these lines. Which is in the body of “Recommendation of sentence, death penalty.” Then, Madame Forelady, you and each and every juror

would sign your name in the places provided. And I trust that you understand that.

By these forms which I hold in my hand, you the jury can recommend to this Court that the defendant be sentenced to life imprisonment. I will now read the text of these recommendations forms. "We, the (p. 1221) jury, in the above-entitled case, recommend to the Court that the defendant, Demetrius Gathers, be sentenced to life imprisonment." And you will see under that heading in parenthesis, "without finding the existence of an aggravating circumstance."

The second—or the third form which I will read is that: "We, the jury, in the above-entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance, to wit: . . ." — " . . . now recommend to the Court that the defendant, Demetrius Gathers, be sentenced to life imprisonment."

As I said to you earlier, you had three possibilities. You could recommend to the Court that the defendant be sentenced to death. You could recommend to the Court that the defendant be sentenced to life imprisonment with finding of the existent aggravated circumstances. And you can make a finding recommending a sentence of life imprisonment without finding the existence of an aggravated circumstance.

The latter two possibilities involve the difference between finding the existence of a statutory aggravating circumstance and finding no aggravated circumstance. In either event you could (p. 1222) recommend that the defendant be sentenced to life imprisonment.

Please note that, although you must unanimously agree to recommend life imprisonment, only the Forelady is required to sign either one of these two recommendations. They differ in the recommendation of sentence for the death penalty, because in that instance each juror, deliberating juror, must sign this form.

I will now instruct you on what you may consider in making your decision as to which sentence to recommend. As I previously instructed, if you find the existence beyond a reasonable doubt of a statutory aggravating circumstance, then you are permitted, but not required, to recommend the death penalty.

There are three conditions which you should consider in reaching your decision. First, whether the defendant has proven by any evidence the existence of a statutory mitigating circumstance. Second, whether the defendant has proven by any evidence the existence of any other mitigating circumstance. And third, whether for any reason you can think of, or for no reason at all, the defendant should be sentenced to life imprisonment.

(p. 1223) What is a statutory mitigating circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly of this state has declared by statute would reduce the severity of the offense of murder. In other words, it is a circumstance recognized by statute as one which, in fairness and mercy, may be considered as extenuating or as reducing the degree of moral culpability for the commission of the act of murder.

A mitigating circumstance is neither justification nor excuse for the murder. It simply lessens the degree

of one's guilt. That is, makes him less blameworthy or less culpable.

What statutory mitigating circumstances should you consider in this case? I am holding up the form which you will have in your jury room called statutory instructions. I refer once again to this sheet. Immediately below the listing of the statutory aggravating circumstances, which I read to you earlier, the text continues: "You may also consider the following statutory mitigating circumstance. One, the age and mentality of the defendant at the time of crime. Two, the defendant has no significant history of prior criminal conviction involving the use of violence against (p. 1224) another person. Three, the murder was committed while the defendant was under the influence of mental or emotional disturbance. Four, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

You may also consider any nonstatutory mitigating circumstances. A nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant claims serves the same purpose. That is, to reduce the degree of his guilt in the offense. While there must be some evidence which supports a finding by you that a statutory or nonstatutory mitigating circumstance exists, you need not find the existence of such a circumstance beyond a reasonable doubt.

In reaching your decision as to which sentence to recommend, you will weigh the aggravating and mitigating circumstances. While an aggravating circumstance must be found before you can even consider recommending the

death penalty, once such finding is made beyond a reasonable doubt you may recommend the death sentence, even though you find the existence of a statutory mitigating circumstance. In other words, the existence of an (p. 1225) alleged statutory mitigating circumstance is not a bar to the imposition of the death penalty.

The third element you may consider, if you should conclude that a statutory aggravating circumstance exists, is whether the defendant should be sentenced to life imprisonment for any reason or for no reason at all. This is what has been traditionally referred to as a recommendation of mercy. And should such be your decision you would so indicate by returning to the Court whichever recommendation of life imprisonment form that is consistent with your finding.

Now let me again remind you that you will have two forms with you in the jury room dealing with a recommendation of life imprisonment. Should you decide to recommend that the defendant be sentenced to life imprisonment, you need not sign both. You must only sign one. One deals with the finding of—or the existence of an aggravated circumstance, and one deals with finding no aggravated circumstance.

In any instance, should you choose to recommend life imprisonment, your decision must be a unanimous one, and again only the foreperson would be required to sign either one of these two recommendation (p. 1226) forms.

Now, Madame Forelady, ladies and gentlemen of the jury, there is a legal theory in South Carolina which can be used in determining guilt called the hand of one is the hand of all. If certain persons are together, acting to-

gether, assisting each other in the commission of an offense, the law says under those circumstances the act of one is the act of all.

This legal theory is restricted to a determination of guilt. I purposefully did not instruct you in this regard during the guilt phase of this trial because the defendant was charged with capital murder. And if he was found guilty we would have to hold, as I previously explained to you, a separate or punishment phase of this trial in which the jury would have to determine the punishment.

I now want to instruct you emphatically that under a decision from the United States Supreme Court an accomplice in the commission of a felony in the course of which a murder is committed by others may not be subjected to the imposition of the death penalty if he does not himself kill, attempt to kill, or intend that a killing take place, or that lethal force be employed.

(p. 1227) The imposition of the death penalty in such a case is violative of the defendant's Eighth Amendment rights. The defendant's criminal culpability must be limited to his participation in the death of and criminal sexual conduct against the defendant, Richard Haynes.

Now, Madame Forelady, ladies and gentlemen, what I am saying to you is, in order for you to bring in a verdict in this phase of the trial which calls for the imposition of the death penalty, you must find beyond a reasonable doubt that the defendant, Demetrius Gathers, did himself kill, attempted to kill, or intended that the killing of Richard Haynes be accomplished.

I do not mean by this that should you find that the defendant Demetrius Gathers did in fact kill, attempted to

kill, or intended to kill the victim Richard Haynes that you are required to bring in a verdict which calls for the imposition of the death penalty. You therefore must pay special attention to the totality of my charge on what your verdict alternatives are.

In this phase of the trial, Madame Forelady, ladies and gentlemen, you have heard about the defendant's past criminal record. I tell you that (p. 1228) proof of a prior criminal record on the part of the defendant should not be used to determine the existence of an aggravated circumstance. Such proof is admitted into evidence for the sole purpose of showing the defendant's character and no more.

Now, Madame Forelady, ladies and gentlemen, I will now summarize what I have just told you. You will have in your jury room during your deliberations four forms. One, recommendation of life in prison form with finding of the existence of an aggravating circumstance. Two, recommendation of life imprisonment form without finding the existence of an aggravated circumstance. Three, recommendation of death penalty form. And, four, statutory instructions.

The statutory instructions state the only aggravating circumstance you shall consider in this case. Should you fail to find beyond a reasonable doubt this circumstance existed at the time the murder was committed, then you would go no further. Your recommendation must be for life imprisonment. Should you find beyond a reasonable doubt the existence of an aggravated circumstance, you would then be authorized to consider recommending the death penalty.

(p. 1229) In your deliberations you will consider any statutory or nonstatutory mitigating circumstances which

are supported by the evidence. You will weigh the aggravating circumstance you found against the mitigating circumstances, and you will then decide whether you will recommend the death penalty or life imprisonment. You may also consider any other factor in mitigation of the offense. And you can recommend a sentence of life imprisonment for no reason at all.

If you decide to recommend the death penalty, you will complete the proper form. You must write out the aggravating circumstance that you found. And all twelve deliberating jurors must sign the recommendation. Should you decide to recommend life imprisonment under either of the two possibilities that I have given you, the foreperson only must sign the appropriate recommendation. And no reason is to be given for your decision.

Whatever your recommendation is, it must be a unanimous one. That is to say, it must be the verdict of each and every juror.

In considering whether to recommend whether the defendant is to be sentenced to death or life imprisonment, I charge you that as jurors you must (p. 1230) decide the issue involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by mere sympathy, by prejudice, by passion or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case, and that you will follow the law as I have explained it to you.

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DEFENSE COUNSEL OBJECTION

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(p. 1234) Mr. Kent: In addition, Your Honor, we would like to note our objection to the State's argument to the jury concerning the prayer that was read. We believe that it's an appeal to passion and improper argument. We would move the Court for a mistrial of the penalty phase of this proceeding, or in the alternative, Your Honor, if the Court does not grant (p. 1235) us the mistrial, to remove that exhibit from the jury's consideration at this time.

The Court: Is it an exhibit in the trial?

Mr. Condon: Yes, Your Honor.

• Mr. Kent: Yes, it is. It's part of the papers.

The Court: All right, sir.

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OPINION OF THE
SOUTH CAROLINA SUPREME COURT
THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, _____ Respondent,

v.

Demetrius Gathers, _____ Appellant.

Appeal from Charleston County
Richard E. Fields, Judge

Opinion No. 22878
Heard March 8, 1988 - Filed June 6, 1988

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

Assistant Appellate Defender Joseph L. Savitz, of the South Carolina Office of Appellate Defense, of Columbia; and Public Defender Joseph F. Kent, of Charleston for Appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, both of Columbia; and Solicitor Charles M. Condon, of Charleston, for Respondent.

GREGORY, C.J. Appellant was convicted of murder and first degree criminal sexual conduct and sentenced to

death. We affirm his convictions, reverse the death sentence, and remand for a new sentencing proceeding.

The victim, Richard Haynes, was a thirty-two-year-old black male. He was a self-proclaimed preacher and called himself "Reverend Minister." Haynes was attacked and killed by four black youths. He was stabbed in the stomach, beaten on the head with a bottle, and his rectum perforated by an umbrella inserted in his anus.

One of the four youths, Steven Hardrick, agreed to testify for the state in exchange for a guilty plea to misprison of a felony. Hardrick testified that he and three others, including appellant, came across the victim late one night at a park bench on a bicycle path. The victim was changing his clothes. Appellant and the victim exchanged some words and appellant then struck the victim in the face. Another youth, Zandall Hayes, also struck the victim. Appellant pinned the victim to the ground while a third youth, Dee Brown, kicked and beat him. They then smashed a bottle on the victim's head.

When the victim stopped moving, Hardrick nudged him with his foot. Hardrick, Brown, and Hayes then left the scene while appellant remained with the victim. The others looked back and saw appellant beating the victim with an umbrella. Hardrick saw appellant push the umbrella into the victim's anus. Appellant then rejoined the others. Appellant and Hayes, however, returned to the victim once more. Appellant said he stabbed the victim with a knife.

During the altercation, the youths rummaged through the victim's belongings and found two Bibles and various

religious articles. These articles were admitted into evidence at the guilt phase of trial.

Appellant confessed to his involvement in the murder but claimed Brown was the main aggressor.

GUILT PHASE

Appellant complains the solicitor injected an arbitrary factor into the jury's deliberation of guilt by attacking appellant's character when appellant had not put his character in issue. The solicitor stated:

Let me first stop to point this out. Someone like Demetrius Gathers is not going to be talking about what he did to the minister over here at the Episcopal Church on the corner or the pastor at Morris Brown A.M.E. Church. Who is he going to be talking to: His own ilk. Who is that? Well, you have people out there like Rose Campbell; Jerome Heyward; James, known as Jeff, Carter. You had a chance to evaluate them. They weren't your sterling citizens that come forward after they heard about all this, but they did testify, and you did have a chance to hear what they had to say.

What do all of them say, to a person? And why would they make this up? They all agree—again Steven Hardrick has been corroborated—that this defendant, this defendant along with Zandell Hayes, went back on that track after they left, just as Steven Hardrick told you. It's been corroborated and corroborated again. So it's just not Steven Hardrick's word.

The persons named by the solicitor are those who testified regarding what appellant said he had done to the victim. Appellant argues the solicitor's statements imply

appellant is a person of bad character by association. We disagree.

Taken in context, these remarks were not an improper comment on appellant's character. The solicitor's argument concerning the credibility of the State's witnesses is within the record and its reasonable inferences. *State v. Cockerham*, — S.C. —, 365 S.E.2d 22 (1988); *State v. Durden*, 265 S.C. 86, 212 S.E.2d 587 (1975). We find no error.

Appellant next contends the solicitor improperly disparaged the exercise of his constitutional rights and contrasted those rights with "the trial and execution" of the victim.

The solicitor's comments regarding appellant's rights to a lawyer and to remain silent are in reference to the voluntariness of appellant's confession, a factual issue submitted to the jury and therefore properly argued.

The solicitor also referred to appellant's right to confront witnesses and stated: "Contrast that in your mind's eye with the trial and the execution of Richard Haynes." This single comment does not rise to the level of prejudice found in *State v. Cockerham, supra*, where the solicitor's extensive comments constituted reversible error. In the context of the entire record, we hold any error harmless beyond a reasonable doubt. *State v. Cockerham, supra*; see also *State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987).

Next, appellant claims the trial judge should have *sua sponte* charged the jury on the defense of alibi based

on his first pre-arrest statement to police that he was not at the scene at the time of the murder. We disagree.

Appellant first stated he was at Rose Campbell's home at Starcastle Apartments from 9:30 p.m. until 1:00 or 1:30 a.m. the night of the murder. The record indicates the murder occurred between 10:00 to 11:00 p.m. on the bicycle path behind Starcastle Apartments. This pre-arrest statement was introduced into evidence by the State to show appellant changed his story when he later confessed to some involvement in the murder.

Appellant did not raise a defense of alibi at trial. In fact, his lawyer stated at the commencement of trial: "For the record . . . there will be no evidence of alibi." During closing argument, defense counsel further stated: "There is no question that he [appellant] was involved in beating him up."

In light of appellant's disavowal of an alibi defense, it was clearly proper that the trial judge did not charge alibi. Moreover, in view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt. *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985).

Next, appellant complains the trial judge improperly charged the jury on implied malice.

The trial judge charged the jury that malice may be implied from the intentional doing of an unlawful act where no excuse or legal provocation appears. This charge was proper. *State v. Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979). Appellant contends, however, the trial judge's charge requiring the jury to determine guilt or innocence

"based upon the evidence" impermissibly shifted the burden to appellant to prove an excuse.

This argument is without merit. Nowhere in the charge does the judge mention the need for rebuttal or explanation of the evidence presented by the State. Moreover, the judge's charge comports with the requirement that it is for the jury to determine from all the evidence whether or not malice is proven. *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986).

Appellant next contends his conviction for first degree criminal sexual conduct should be reversed because of an alleged violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). We disagree.

Pursuant to appellant's request for disclosure of evidence, the State provided an autopsy report prepared by Dr. Conradi. The report stated that the rectal wound was a contributory injury. At her meeting with defense counsel before trial, Dr. Conradi explained the sexual battery occurred "perimortem" or as death was occurring.

Appellant complains the State did not disclose evidence that Dr. Conradi equivocated as to whether the rectal wound was pre- or post-mortem at an early interview with a co-defendant's counsel. He contends this information would have allowed effective impeachment of Dr. Conradi at trial.

In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record. *State v. Osborn*, 291 S.C. 265, 353 S.E.2d 276 (1987). The State's failure to disclose information warrants a reversal as a *Brady* violation only if the omission

deprived the defendant of a fair trial. *Id.*; *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981); *see also U. S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant effectively cross-examined Dr. Conradi at trial and she conceded she had previously expressed an opinion she was unsure whether the rectal wound was before or after death. She further explained it was now her firm opinion the wound was pre-mortem. Because appellant has failed to show any prejudice from the alleged nondisclosure, we hold there was no error.

Accordingly, we affirm appellant's convictions for murder and first degree criminal sexual conduct.

SENTENCING PHASE

Appellant contends the solicitor's closing argument at the sentencing phase of trial violated *Booth v. Maryland*, 482 U.S. —, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. We agree.

The solicitor's argument included these remarks:

We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. . . . Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers cared little about the fact that he is a religious person. . . . But look at Reverend Minister Haynes' prayer. It's called "The Game Guy's Prayer." "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you

need me. I only ask you for the stuff to give you 100% of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me always to play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and to think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frame-up or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life." Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.

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Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. It speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend

Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.

In *Booth*, the United States Supreme Court held the victim's personal characteristics are not proper sentencing considerations in a capital case. 107 S.Ct. at 2535. The Court reasoned there is no justification for permitting a capital sentencing decision "to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." 107 S.Ct. at 2534. Moreover, it would be impossible to provide the defendant "a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." 107 S.Ct. at 2535. The Court concluded the injection of the victim's personal characteristics into the sentencing determination violated the Eighth Amendment.

The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. *Cf. State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. *Accord State v. Gaskins, supra* (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

We need not address appellant's remaining exceptions. Appellant's convictions are affirmed, the death sentence

reversed, and the case is remanded for a new sentencing proceeding.

AFFIRMED IN PART; REVERSED IN PART;
and REMANDED.

HARWELL, CHANDLER, FINNEY, JJ., and Acting
Associate Justice J. B. Ness, concur.
